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7 NEIL A. JENSEN,
8 Plaintiff,
9 v.
10 BNSF RAILWAY COMPANY,
11 Defendant.

Case No. 13-cv-05955-HSG

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**ORDER DENYING MOTION FOR NEW
TRIAL**

Re: Dkt. No. 225

A seven-day jury trial in this action brought under the Federal Railway Safety Act (“FRSA”) began on October 26, 2015. Dkt. No. 169. On November 3, 2015, the jury returned a verdict in favor of Defendant BNSF Railway Co., finding that Plaintiff Neil Jensen failed to prove a violation of the FRSA. Dkt. No. 210.

Pending before the Court is Plaintiff’s motion for new trial. Dkt. No. 225. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument, and hereby VACATES the hearing on this matter currently scheduled for February 4, 2016, at 2:00 p.m. For the reasons articulated below, Plaintiff’s motion is DENIED.

21 **I. BACKGROUND**

22 Plaintiff alleged a single cause of action for violation of § 20109(c)(2) of the FRSA. Dkt.
23 No. 1. To prevail, Plaintiff had to show by a preponderance of the evidence that (1) he engaged in
24 protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered
25 an adverse personnel action; and (4) the protected activity was a contributing factor to the adverse
26 action. *Araujo v. N.J. Transit Rail Operations*, 708 F.3d 152, 157 (3d Cir. 2013); *see also* Dkt.
27 No. 139-1 at 29 (Plaintiff’s proposed jury instruction agreeing in substance with this
28 characterization of the elements of his FRSA claim). If Plaintiff satisfied this burden, Defendant

1 could avoid liability if it proved by clear and convincing evidence that it would have terminated
2 Plaintiff even if he had not engaged in protected activity. *Araujo*, 708 F.3d at 157. Plaintiff
3 sought compensatory damages—including back pay, front pay, lost benefits, and damages for
4 emotional distress—and punitive damages.

5 **II. DISCUSSION**

6 **A. Legal Standard**

7 Under Federal Rule of Civil Procedure 59(a)(1), a court “may, on motion, grant a new trial
8 on all or some of the issues.” A court may grant a new trial “if the verdict is contrary to the clear
9 weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of
10 justice.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (internal quotation marks
11 omitted). A judge should not grant a new trial unless “left with the definite and firm conviction
12 that a mistake has been committed.” *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365,
13 1372 (9th Cir. 1987) (internal quotation marks omitted). In considering a Rule 59(a) motion for a
14 new trial, the Court “is not required to view the trial evidence in the light most favorable to the
15 verdict. Instead, the district court can weigh the evidence and assess the credibility of the
16 witnesses.” *Experience Hendrix LLC v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir.
17 2014).

18 **B. Analysis**

19 Plaintiff presents three arguments in support of its motion for new trial: (1) defense
20 counsel misstated the applicable law during closing argument; (2) defense counsel engaged in
21 attorney misconduct; and (3) the verdict rendered was against the clear weight of the evidence.

22 **1. Misstatement of Applicable Law**

23 Plaintiff first argues that defense counsel misstated the applicable law regarding the
24 protected activity at issue in this case—namely, “following orders or a treatment plan of a treating
25 physician.” FRSA § 20109(c)(2). In closing argument, defense counsel argued at times that the
26 doctor’s note presented by Plaintiff at trial was not a treatment plan because it was not “by”
27 Plaintiff’s treating physician. Tr. at 1135:6-7. In other words, defense counsel substituted “by a
28 treating physician” for “of a treating physician.”

1 To clarify defense counsel's misstatement—which by all indications was inadvertent—the
2 Court read the following jury instruction:

3 Instruction Number 13 [which provided the correct statement of
4 applicable law regarding FRSA treatment plans] provides the entire
5 legal instruction that you must follow to determine liability under
6 the FRSA. You should disregard any suggestion made in closing
7 arguments that any different legal standard applies other than the
8 one contained in Instruction Number 13.

9 *Id.* at 1222:16-20. The jury had paper copies of Instruction Number 13 to reference during its
10 deliberations. Additionally, the Court separately instructed the jury that closing arguments were
11 not evidence. *See id.* at 1190:1-7.

12 "District courts have wide discretion in crafting jury instructions, and this wide discretion
13 carries over to a trial judge's response to a question from the jury." *United States v. Humphries*,
14 728 F.3d 1028, 1032 (9th Cir. 2013) (internal quotation marks omitted). A party "is entitled to a
15 new trial if the instruction actually given was misleading or inadequate to guide the jury's
16 deliberation." *United States v. Renzi*, 769 F.3d 731, 755 (9th Cir. 2014). Here, the Court's
17 supplemental instruction clearly pointed the jury to the correct statement of law. The jury was
18 properly instructed to consider the law as described by the Court, not counsel. The Court finds
that the curative jury instruction was sufficient, and therefore finds that Plaintiff is not entitled to a
new trial.¹

19 **2. Attorney Misconduct**

20 Second, Plaintiff argues that, in addition to the purported misstatement of law described
21 above, defense counsel committed egregious attorney misconduct by personally attacking
22 Plaintiff's counsel, maligning Plaintiff's character, discrediting Dr. Galli, Plaintiff's treating
23 physician who testified at trial, and misrepresenting another witness' testimony. The Court finds
24 that all of the alleged misstatements of fact described by Plaintiff were fair characterizations of the
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¹ Plaintiff's proposed jury instruction was supported by neither the evidence introduced at trial nor
27 the law. Plaintiff requested the Court to instruct the jury, based on the California Business and
28 Professions Code, that "'of a treating physician' includes the plan of an authorized physician's
assistant." Tr. at 1215:21-24. Plaintiff offered no evidence whatsoever or relevant FRSA
authority on this point.

1 evidence produced at trial and therefore did not prejudice Plaintiff in any way warranting a new
2 trial.

3 **3. Clear Weight of the Evidence**

4 Finally, Plaintiff argues that the jury's verdict goes against the clear weight of the
5 evidence. Plaintiff's arguments in this regard overlap substantially with those advanced in support
6 of its motion for judgment as a matter of law, which the Court denied. Dkt. No. 226. The Court
7 has considered the evidence and argument presented at trial, and concludes that the jury's verdict
8 is not contrary to the clear weight of the evidence. As detailed in the order denying Plaintiff's
9 motion for judgment as a matter of law, the Court finds that the evidence presented at trial
10 reasonably supported the jury's verdict, which the Court is firmly convinced was not mistaken.

11 **III. CONCLUSION**

12 For the foregoing reasons, Plaintiff's motion for new trial is DENIED.

13 **IT IS SO ORDERED.**

14 Dated: 1/15/2016

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17 HAYWOOD S. GILLIAM, JR.
18 United States District Judge